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No. 03-411

IN THE

Supreme Court of the United States

FRED PARKER, *et al.*,
Appellants,

v.

STATE OF OHIO, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

DONALD J. MCTIGUE
3886 North High Street
Columbus, Ohio 43214
(614) 263-7000

JEFFREY M. WICE
PO Box 42442
Washington, DC 20015
(202) 494-7991

Attorneys for Appellants

PERCY SQUIRE
LLOYD PIERRE-LOUIS
LAW OFFICES OF SQUIRE & PIERRE-LOUIS, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215
(614) 224-6528

Attorneys for Appellants

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Appellants respectfully urge the Court to deny Appellees' motion to summarily affirm the decision below rather than grant plenary review of the important issues raised in this appeal. An extensive response to Appellees' Motion in this Memorandum is not necessary. The summary of the evidence and the explanations of why the questions presented for review are substantial are set forth in Appellants' Jurisdictional Statement. The statement of the case and legal arguments set forth in the Jurisdictional Statement on all questions presented for review are hereby offere in response to Appellees' Motion. In addition, Appellants offer the following comments with respect to analysis of "influence" claims under Section 2 of the Voting Rights Act of 1965, as amended.

Although having been presented in other cases with the opportunity to address whether "influence" claims are cognizable under Section 2 of the Voting Rights Act, the Court has declined to do so, reserving the question for another day and another case. This is that case.

In *Thornburg v. Gingles*, 478 US 30 (1986), at n.12, the court stated:

> 12. . . . We have no occasion to consider whether §2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that *is not sufficiently large* and compact *to constitute a majority in a single-member district*, alleging that the use of a multimember district impairs its ability to influence elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondent's claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote. (Emphasis supplied.)

Subsequently, in *Growe v. Emison*, 507 US 25 (1993), the Court held that the three *Gingles* preconditions applied to a Section 2 challenge to a single member districting plan, at least where minority voters are able to constitute a majority of a district under an alternative plan. The Court, at n.5, noted that it was not addressing whether the *Gingles* preconditions applied to an influence claim:

> 5. Gingles expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure

> impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. *Gingles, supra*, at 46-47, n.12. We do not reach that question in the present case either: although the Emison plaintiffs alleged both vote dilution and minimization of vote influence (in the 1983 plan), the District Court considered only the former issue in reviewing the state court's plan.

Two of the three Judges below determined that an influence claim is not cognizable under Section 2. The third determined that such a claim may be maintained but that plaintiffs' claim failed under the third *Gingles* precondition. However, the instant case, in addition to presenting the question of whether an influence claim is cognizable under Section 2, also presents the question of whether the third *Gingles* precondition, or some variation of it, will apply. The instant case presents a clear opportunity for the Court to answer once and for all whether influence claims are cognizable under Section 2. Only in the event that the Court answers this question in the affirmative does that question regarding the third *Gingles* precondition present itself. That issue may then be addressed by the Court if it deems it appropriate or the issue may be dealt with on remand.

A consideration of what may be the appropriate conditions to be applied under an influence claim should be determined in the light of the Court's pronouncements in earlier cases regarding factors to be considered in any action under Section 2 of the Voting Rights Act. The Court has stated that Section 2 claims require district courts to employ a highly individualist analysis. In this connection, the Court found as follows:

> [I]n evaluating a statutory claim of vote dilution through districting, the trial court is to consider the 'totality of circumstances' and to determine based 'upon a searching practical evaluation of the past and present reality'. . .

> whether the political process is equally open to minority voters. 'This determination is peculiarly dependent upon the facts of each case' . . . and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms. . .[and] particularly familiarity with the indigenous political reality. (*Thornburg*, 478 US 30)

Contrary to Appellees' assertion, Appellants did introduce evidence going to the third *Gingles* precondition. Further, the evidence established that there is polarized voting and that the opportunity of minority voters to elect candidates of their choice is diluted under the adopted state redistricting plan from what it would be under an alternative plan.

Appellees argue that influence claims presume significant white cross-over voting that necessarily negates the third *Gingles* precondition. However, this only points out the fact that the third *Gingles* precondition may be incompatible with an influence claim and new criteria may need to be developed. What constitutes legally significant block voting under such a claim may have a different answer than under the traditional Section 2 claim.

Section 2 of the Voting Rights Act guarantees to minorities an equal opportunity to elect the candidates of their choice. Dilution of minority voting strength may result from placing too few or too many minorities in a legislative district. The purpose of the *Gingles* third precondition is to provide a measure to demonstrate that minority voters are or will be harmed by the challenged districting plan. In a vote dilution case based on too few minority voters being placed in a district (a "fragmenting" claim), if the preferred candidates of minority voters are usually defeated by non-minority voters under an existing plan, then this provides an indication of actual harm. However, the *Gingles* third precondition does not work so well in a dilution claim based on too many minority voters being placed in a district (a "packing" claim).

In a district "packed" with minority voters, the preferred candidate of minority voters will not usually be defeated by non-minority voters. Nonetheless, traditional "packing" claims are treated as cognizable under Section 2. The focus is on whether minority voters "packed" into a district may be placed in redrawn districts without creating districts where the preferred candidates of the minority voters would usually be defeated by non-minority voters. To the extent that minority voters are sufficient in number to comprise a majority in more than one district, this is the case, assuming political cohesiveness.

An "influence" claim is a variation on a "packing" claim. Like a "packing" claim an "influence" claim maintains that too many minority voters have been placed in a district and that it is possible to redraw district lines such that minority voters will have an equal opportunity to elect the candidate of their choice in more than simply the challenged district. The question then becomes what place, if any, the third *Gingles* precondition will play in determining whether the alternative plan makes a difference by preventing dilution of minority voting strength. Indeed, there is a strong and cogent argument that the third Gingles precondition should not be mechanically applied to defeat an otherwise demonstrable claim of dilution of equal opportunity of minorities to elect candidates of their choice. Rigid application of *Gingles* should not be employed to cut short consideration of other types of claims which fulfill the venerable purposes of the Voting Rights Act. For these reasons, the treatment by the Court below of the third *Gingles* precondition is not dispositive of Appellants' claims.

CONCLUSION

For all the foregoing reasons, Appellees' Motion to Affirm should be denied.

Respectfully submitted,

DONALD J. MCTIGUE
3886 North High Street
Columbus, Ohio 43214
(614) 263-7000

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Washington, DC 20015
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